

TOM McMAKIN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

JOHN MEYER,

Plaintiff,

vs.

Cause No. 18-CV-00002-BMM

BIG SKY RESORT, INC.

Defendant.

VIDEOTAPED DEPOSITION UPON ORAL EXAMINATION OF
TOM McMAKIN

BE IT REMEMBERED, that the videotaped deposition upon oral examination of TOM McMAKIN, appearing at the instance of Defendant, was taken at the offices of Crowley Fleck, PLLP, 1915 South 19th Avenue, Bozeman, Montana 59718 on the 21st day of January 2020, beginning at the hour of 1:34 p.m. pursuant to the Federal Rules of Civil Procedure, before Marla Jeske, Court Reporter - Notary Public, CSR.

TOM McMAKIN

APPEARANCES

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TOM McMAKIN

I N D E X

EXAMINATION OF TOM McMAKIN BY	PAGE
Mr. Ian McIntosh, Esq.....	5, 35
Ms. Breean Walas, Esq.....	19, 38
E X H I B I T S R E F E R R E D T O:	
Exhibit 19.....	35, 38
Exhibit 24.....	8, 13-14, 19, 27
Exhibit 25.....	9-10, 13-14, 19-20, 27
Exhibit 29.....	11, 13, 19
DEPOSITION EXHIBITS:	
Exhibit 65 Colored Photograph.....	20-21
Exhibit 66 Big Sky Ski Patrol	
Witness Statement	
dated 12/11/15.....	22-23
Exhibit 67 Evi Dixon letter dated	
Sunday, December 13, 2015.....	25-26
Exhibit 68 Colored Photograph.....	36-37
Exhibit 69 Colored Photograph.....	36-37

TOM McMAKIN

1 WHEREUPON, the following proceedings were had
2 and testimony taken, to-wit:

3
4 * * * * *

5
6 VIDEO TECHNICIAN: This is the time and
7 place set for the video deposition of Tom McMakin
8 in the case of John Meyer, plaintiff, versus Big
9 Sky Resort, defendant. It is Cause Number
10 18-CV-00002-BMM in the United States District Court
11 for the District of Montana, Butte Division.

12 This video deposition is being held at
13 the offices of Crowley Fleck, located at 1915 19th
14 Avenue in Bozeman, Montana.

15 Today's date is January 21st, 2020. The
16 time is 1:34 p.m.

17 The court reporter is Marla Jeske with
18 Bridger Court Reporting. I'm Mark Brown, the
19 videographer.

20 Will the attorneys please now identify
21 themselves for the record.

22 MS. WALAS: Breean Walas on behalf of the
23 plaintiff.

24 MR. McINTOSH: Ian McIntosh for the
25 defendant, with Mac Morris.

TOM McMAKIN

1 VIDEO TECHNICIAN: Will the witness now
2 please be sworn in.

3
4 * * * * *

5
6 TOM McMAKIN,
7 called as a witness herein, having been first duly
8 sworn, was examined and testified as follows:

9
10 EXAMINATION

11 BY MR. MCINTOSH:

12 Q. Can you please state your name?

13 A. Full name is Thomas Wilson McMakin, Tom
14 McMakin.

15 Q. Mr. McMakin, where do you live?

16 A. 305 Evening Star Lane, Bozeman, Montana.

17 Q. And, Mr. McMakin, what do you do for
18 work?

19 A. I'm a CEO of a consulting firm called,
20 Profitable Ideas Exchange.

21 Q. What does Profitable Ideas Exchange do?

22 A. So we help large professional services
23 firms, like accounting firms and firms like Bain or
24 BCG or McKinsey, drive their business development
25 efforts.

TOM McMAKIN

1 Q. Thank you.

2 And I understand that you were skiing at
3 the Big Sky Ski Resort on December 11, 2015; is
4 that correct?

5 A. Correct.

6 Q. And did you witness a ski wreck
7 involving a person that you later learned was
8 John Meyer?

9 A. I did.

10 Q. Okay. I want to talk to you in detail
11 about that ski wreck. But before we get into the
12 details about the wreck, I want to back up and just
13 talk about what you were doing there and why you
14 were there that day --

15 A. Sure.

16 Q. -- okay?

17 So let's start with that. Before we get
18 into any of the details, tell me what were you
19 doing at Big Sky on December 11, 2015?

20 A. So we had -- I think at the time we had
21 about 30 people in the company, PIE, Profitable
22 Ideas Exchange, and we had taken them and their
23 spouses or partners on a ski day.

24 Q. So you were skiing just with your
25 employees?

TOM McMAKIN

1 A. Correct.

2 Q. And can you describe your ski abilities
3 at that time?

4 A. Yeah, so I've been skiing -- I'm 58.
5 I've probably been skiing since I was five years
6 old. But I'm not a double black diamond expert
7 skier. I look good on tough blue square groomers
8 and I can get down anything, so somewhere in that
9 netherworld between high intermediate and low
10 expert.

11 Q. Got it. And how about the people you
12 were skiing with, how did your abilities compare to
13 them?

14 A. You know, we broke up, because we
15 probably had 40 people there with partners, into
16 smaller groups and I was with a fast group. So, I
17 mean we were all comparable.

18 Q. Okay. And sometime after 10:00 a.m. in
19 the morning, were you skiing the Challenger
20 chairlift area?

21 A. Yes.

22 Q. And do you remember what you skied?
23 Shortly before you witnessed John Meyer's ski
24 wreck, do you remember what ski run you skied?

25 A. I don't. I don't have very good

1 knowledge. My recollection is that we skied out of
2 Moon Light Basin, the tented area there and we were
3 kind of skiing over to the Big Sky. So the run in
4 question was kind of a -- kind of a northeastern
5 facing run, that's my recollection, moving toward
6 the Big Sky Resort, yeah.

7 Q. Okay. So you were moving towards the
8 Big Sky base area?

9 A. Yeah, exactly.

10 Q. Okay. I'm going to hand you what has
11 previously been marked in this case as Exhibit
12 Number 24.

13 A. Uh-huh.

14 Q. Do you recognize what is shown in
15 Exhibit 24?

16 A. Sure. So as I look at this, behind me
17 is a steep slope and this is a traversing road that
18 roughly goes from the south to the north and in
19 front of that is a kind of ungroomed area and the
20 wide slope in the sort of more distant perspective
21 goes down to the base area. And I know there's a
22 big -- I mean I knew afterwards because we went
23 down, there's a big ski patrol hut there.

24 Q. And is the ski run that is shown in
25 Exhibit 24, is that the run you skied shortly

1 before you witnessed Mr. Meyer's ski wreck?

2 A. Correct. So as I'm looking at this,
3 directly behind me is the sort of steep slope and I
4 had come down that slope and rested on that
5 traversing road. When I say "rested," I stopped
6 and I was waiting for the rest of our sort of
7 subset group to catch up with me.

8 Q. Okay. Let me show you another picture
9 taken just a little bit further downhill. This is
10 a photograph that's been previously marked in this
11 case as Exhibit Number 25.

12 A. Uh-huh.

13 Q. And do you recognize what is shown in
14 Exhibit 25?

15 A. Yeah. So that's the traversing road.

16 Q. The cat track that you see going from --

17 A. Correct.

18 Q. -- right to left of the --

19 A. Yep.

20 Q. -- photograph?

21 And do you agree that Exhibit 25 shows
22 the area that you skied shortly before you saw
23 Mr. Meyer's ski wreck?

24 A. Correct.

25 Q. And do I understand you to say from your

TOM McMAKIN

1 earlier testimony that you skied down this -- down
2 this ski run and stopped on the cat track shown in
3 Exhibit 25?

4 A. Correct.

5 Q. Would you agree with me that you can see
6 the cat track in Exhibit 25?

7 A. Correct, yes.

8 Q. Would you agree with me that it's
9 obvious?

10 A. Oh, yeah. Yes.

11 Q. And above that we see some trees and I
12 guess sort of stumps and things like that sticking
13 through the snow; is that right?

14 A. I don't see stumps. I see sort of low
15 trees, brush.

16 Q. That's probably a better description,
17 thank you. Thank you, Mr. Makin [sic] -- Mr.
18 McMakin.

19 And is that the type of thing that you
20 expect to see when you're skiing in early season
21 conditions?

22 A. Yes.

23 Q. And were you able to safely ski down the
24 run shown in Exhibit 25 onto the cat track?

25 A. Yes.

TOM McMAKIN

1 Q. You were able to safely make the
2 transition from the cat track onto the run?

3 A. Hum.

4 Q. In other words, you didn't wreck when
5 you skied onto the cat track, did you?

6 A. Yeah, I just think you had it in
7 reverse. I was able to successfully go down the
8 ski run to the cat track.

9 Q. And were you skiing in control?

10 A. Absolutely.

11 Q. And you then stopped on the cat track?

12 A. Correct.

13 Q. Okay. I want to show you one more
14 photograph. This is a photograph that was
15 previously marked in this case as Exhibit Number
16 29.

17 Now looking at all of those photographs
18 that you have in front of you, did you stop on the
19 cat track in approximately the area where the
20 person is shown in Exhibit 29?

21 A. Yes.

22 Q. And when you stopped there, did you then
23 look back uphill to see the other skiers that you
24 were with?

25 A. Yes, I was waiting for the rest of the

1 party to catch up.

2 Q. Okay. So you were skiing faster than
3 them or you got down to that area faster than they
4 did?

5 A. Yeah. I might have started first.

6 Q. Okay.

7 A. They might have been gaining on me, I
8 don't know.

9 Q. And when you look back uphill, did you
10 see a person coming down that you eventually
11 learned was John Meyer?

12 A. Yes.

13 Q. And can you describe for me what you saw
14 when you saw Mr. Meyer skiing down the hill?

15 A. You know what I told my wife, I said he
16 was -- there was a guy, he came around kind of the
17 high corner and he was bombing down the slope at
18 sort of like -- at a high speed.

19 Q. Okay. What do you mean "bombing down
20 the slope"?

21 A. You know, when you ski -- you know, this
22 is sort of -- it's rough and it's hard to tell with
23 these pictures but it's -- you know, I have a
24 strong recollection that it was lightly moguled and
25 when you ski something like that, people like me

TOM McMAKIN

1 tend to carve their way down through the moguls
2 and -- but when someone's bombing down, they're
3 taking the moguls all in their thighs, bumping
4 straight down with no curves at all. So that's
5 what I mean by "bombing."

6 Q. Okay. And was Mr. Meyer skiing down the
7 run shown in Exhibits 24 and 25?

8 A. Correct.

9 Q. And did he ski down toward you when you
10 were standing on the cat track in the location of
11 the person shown in Exhibit 29?

12 A. Correct. He basically was following the
13 same path that I took to get to the cat track.

14 Q. Okay. And was he skiing faster than you
15 would expect someone who described themselves as an
16 intermediate skier to ski?

17 MS. WALAS: Objection, foundation.

18 MR. McINTOSH: Go ahead.

19 THE WITNESS: I can go ahead?

20 MR. McINTOSH: Yes.

21 THE WITNESS: Absolutely faster than an
22 intermediate skier, sort of a -- I would have
23 characterized his skiing as the kind of skiing that
24 only someone that was a high expert would ski.

25 ///

1 BY MR. MCINTOSH:

2 Q. And did Mr. Meyer --

3 A. Very fast.

4 Q. Excuse me, very fast?

5 A. Yes.

6 Q. So you would agree that Mr. Meyer was
7 skiing very fast?

8 A. Very fast.

9 Q. Faster than you skied the run?

10 A. A lot faster than I skied the run, a lot
11 faster than anyone else skied the run that I saw.

12 Q. And did Mr. Meyer slow down before he
13 reached the cat track that you were standing on?

14 A. No.

15 Q. And did Mr. Meyer -- well, did he safely
16 ski onto the cat track?

17 A. He did.

18 Q. Can you just describe for me what you
19 saw as Mr. Meyer transitioned from this run shown
20 in Exhibit 24 and 25 onto the cat track?

21 A. So my impression in the split second
22 that this all transpired was that he was a high
23 expert skier. He was sort of hotdogging down the
24 slope at a high rate of speed capitalizing on his
25 high ability to do that and that he was going to

1 use the cat track as a jump.

2 Q. And why do you say he was -- why do you
3 say you thought he was going to use the cat track
4 as a jump?

5 A. Because he didn't slow down at all and
6 it was -- it was obvious that the cat track was in
7 front of him, but more obvious was that there was a
8 drop-off on the other side.

9 Q. The downhill side of the cat track?

10 A. Yeah, exactly, exactly. Into an
11 unplowed area -- or not unplowed, ungroomed area or
12 unskied area.

13 Q. Okay. Was there anything that would
14 have prevented Mr. Meyer from slowing down or
15 stopping on the cat track where you stopped?

16 A. If he had been going at a lower rate of
17 speed, nothing would have prevented him. But at
18 that speed, I'm not sure he could have stopped at
19 the last minute if he wanted to.

20 Q. Okay. So what happened after Mr. Meyer
21 safely transitioned onto the cat track?

22 A. He was launched into the air and flipped
23 around.

24 Q. And did it look to you like he was
25 trying to jump off the downhill edge of the cat

1 track?

2 A. It did.

3 Q. And then what happened?

4 A. So he landed on his back in deep snow.
5 And the reason I feel like I thought he was trying
6 to jump is because I thought that he failed to do
7 what he wanted to do, which was to jump
8 successfully and flip. And I remember saying -- it
9 was a little uncharacteristic for me but I was like
10 "Whoa, dude, that was awesome. Are you all right?"
11 Because I thought he was trying to execute a really
12 hard thing to do, which was flip off the cat track.

13 Q. And did you go to Mr. Meyer's aid and
14 help him?

15 A. So I looked at him and I said that
16 and then -- and he didn't answer. And so then I
17 kind of got off the cat track and started to
18 traverse the unskied area, the deeper snow and I
19 probably -- I didn't go very far, five feet or so,
20 and then I could see that he was on his back and
21 his arms were wide open and he was shaking and it
22 looked like something was coming out of his mouth.
23 And I was like, oh, my God, he's in deep trouble,
24 deep, deep trouble, and that's when I saw the log.
25 He basically flipped and landed on a log. And I

TOM McMAKIN

1 immediately thought well, he's broken his neck.

2 Shall I just continue?

3 And so I remember -- I mean I remember
4 this very clearly, there were some younger people.
5 I can't call them kids, right? I'm like anybody
6 younger -- I'm 58, so younger than I am, people,
7 sort of a mass on the cat track, maybe 12 people or
8 so. And this shows my age. I said, "Someone ski
9 down and get ski patrol."

10 And then some kid said "Or, dude, we
11 could just call them on the cell phone."

12 And I was like, "Right. You're right.
13 That is what you could do. That would be better."

14 Q. So someone called ski patrol?

15 A. I assume. Ski patrol was there very
16 quickly.

17 Q. Very quickly?

18 A. Very quickly.

19 Q. And when Mr. Meyer tried to -- or based
20 on what you thought he was trying to do, tried to
21 jump off that downhill edge of the cat track, how
22 far away were you?

23 A. That's a good question. Probably 10
24 feet.

25 Q. And based on what you saw and what you

TOM McMAKIN

1 observed from 10 feet away, what did you conclude
2 was the cause of Mr. Meyer's ski wreck?

3 A. His failure to execute the jump off
4 of this track or -- you know, I felt like
5 there's -- there was a change. So you had this
6 sort of skied area, so that's one kind of
7 topography, and then you have the track, so you hit
8 the track, but it's quite -- it's quite packed
9 down. It has a kind of accelerating kind of
10 function that it plays and then on the other side
11 of it it got rough again. And I thought he hit
12 that roughness on the far side of the track and
13 that that flipped him over. But it's conjecture on
14 my part. But that's what it felt like.

15 Anyway, if you ski, you know that a
16 change in the quality of the snow from fast and
17 slick to rough and unskied and icy and choppy can
18 trip you up.

19 Q. And did you believe Mr. Meyer's speed he
20 was skiing at contributed to his ski wreck?

21 A. Absolutely.

22 Q. Mr. McMakin, I believe that's all the
23 questions I have. If we could just go off the
24 record for a few minutes while I check my notes.

25 A. You bet.

TOM McMAKIN

1 Q. Thank you.

2 A. Yeah.

3 VIDEO TECHNICIAN: We're now off the record.
4 The time is 1:50.

5 (Whereupon, a brief
6 recess was taken.)

7 VIDEO TECHNICIAN: We're now back on the
8 record. The time is 1:51.

9 MR. McINTOSH: Mr. McMakin, thank you for
10 your time. Thank you for coming in today. I have
11 no further questions at this time.

12 THE WITNESS: Thanks.

13 EXAMINATION

14 BY MS. WALAS:

15 Q. All right. Mr. McMakin, I want to
16 follow up on a couple of things that you were asked
17 about and then also some other further questions I
18 might have.

19 You were asked about Exhibit 24.

20 A. Which one is that?

21 Q. Which would be the one that has this
22 little guy over here in the corner.

23 A. Oh, this guy. I got it.

24 Q. Yep. And 25, which would be the one
25 that you have three guys?

TOM McMAKIN

1 A. Yep.

2 Q. Okay. Where were you standing on the
3 cat track in relation to Mr. Meyer's wreck?

4 A. You know, to be honest, I don't recall
5 but roughly where those three people are.

6 Q. Okay. And that's on Exhibit 25?

7 A. Yeah.

8 Q. Okay. And where did Mr. Meyer wreck?

9 A. In the snow field above in the picture
10 of the three people.

11 Q. Above the picture of the three people?

12 A. Yeah.

13 Q. So if you were -- I'm going to go ahead
14 and give you this blue pen.

15 A. Uh-huh.

16 Q. And if you'll go ahead and mark that,
17 I'm going to make this Depo Exhibit 1.

18 MR. MCINTOSH: No.

19 MS. WALAS: Do you guys roll over?

20 MR. MCINTOSH: Yep.

21 MS. WALAS: Okay. What number are we on?

22 MR. MCINTOSH: 65.

23 MS. WALAS: 65, okay. So this will be
24 Exhibit 65.

25 ///

TOM McMAKIN

1 (Whereupon, Deposition
2 Exhibit Number 65 was
3 marked for identification.)

4 THE WITNESS: So roughly there.

5 BY MS. WALAS:

6 Q. Roughly there?

7 A. Yeah.

8 Q. Okay. And if you don't mind, will you
9 circle that just to make it clear?

10 A. Uh-huh.

11 Q. Perfect.

12 And then using that same picture, can
13 you recall where you were?

14 A. You know, I'm saying roughly here. I
15 was to the -- so I know I was to the left. So if
16 it happened over here, that wouldn't surprise me.

17 Q. Okay.

18 A. But I was roughly to the left of
19 something that happened down here. But I don't
20 really recall.

21 Q. Okay. And when you were coming down the
22 hill, did you see the rocks that Mr. Meyer hit?

23 MR. McINTOSH: Objection, assumes facts not
24 in evidence. Counsel's testifying.

25 MS. WALAS: You can go ahead and answer.

TOM McMAKIN

1 MR. MCINTOSH: You can answer.

2 THE WITNESS: I don't know. So I mean I know
3 that I saw -- I know that I saw the ungroomed area
4 that he crashed in that had early season stuff in
5 it, trees and bushes and rocks and whatnot. But
6 the rocks that he hit, I don't know. I don't know
7 that I -- it registered on my consciousness. I
8 mean I know that I was looking at it when I went
9 down the slope and stopped.

10 BY MS. WALAS:

11 Q. And do you recall giving statements to
12 Big Sky?

13 A. Yes, I do.

14 Q. Okay. And do you recall in that
15 statement what you told them?

16 A. I do not specifically, no.

17 Q. Would it be helpful to see these?

18 A. Yeah, that would be super. Yeah. I
19 mean they asked questions not -- so dissimilar to
20 what you all are asking right now, mainly what
21 happened.

22 MS. WALAS: I apologize, I did not bring
23 copies. This will be 66. Go ahead and mark this
24 as Exhibit 66.

25 ///

TOM McMAKIN

1 (Whereupon, Deposition
2 Exhibit Number 66 was
3 marked for identification.)

4 MS. WALAS: We can go off the record real
5 quick.

6 VIDEO TECHNICIAN: We're now off the record.
7 The time is 1:55.

8 (Whereupon, an off-
9 the-record-discussion
10 then took place.)

11 VIDEO TECHNICIAN: We're back on the record.
12 The time is 1:56.

13 BY MS. WALAS:

14 Q. So I've given you what is Exhibit 66 and
15 is that your witness statement?

16 A. Yes.

17 Q. Now is there anything in this witness
18 statement that you would change or add to?

19 A. So let's read it aloud because I'm not
20 sure I can read it. "Tom was standing" -- what's
21 the next word there?

22 Q. I believe it's "below."

23 A. "Below the patient to his right.
24 Patient came down from" -- so that first sentence,
25 "Tom was standing below the patient to his right."

1 So directions are a funny thing. So I was on the
2 cat. So first of all, "his" -- it's unclear
3 whether "his" refers to patient or me. But I'll
4 tell you what I know, which is that I was standing
5 on the cat track and I was -- I was stopped, my
6 skis were together, I was facing more toward the
7 south than to the right of the cat track. I was
8 facing that direction. And my head was turned
9 uphill to my right and the skier came down the
10 slope to my right. I'm not sure if that first
11 sentence says that or not, but that's what
12 happened.

13 So the second sentence says "Patient
14 came down from highway." So I don't know what
15 highway refers to. Is that the cat track? Because
16 he came down from the slope above the cat track and
17 hit rocks as he was about to jump off of Morning
18 Star Road, Loop Road. "Both skis ejected and he
19 rotated head first and landed on a log with the
20 back of his head and neck. He was unconscious the
21 entire time but was breathing. He did not move,
22 eyes did not open. Breathing through nose only."
23 Does that sound like what it says?

24 Q. I mean I think you've read it back
25 accurately.

TOM McMAKIN

1 Is there anything in there that you
2 disagree with?

3 MR. McINTOSH: Objection, vague.

4 MS. WALAS: I'll restate it.

5 BY MS. WALAS:

6 Q. Do you recall this being an accurate
7 representation of what you told the Big Sky ski
8 patrol that day?

9 A. Yes.

10 Q. And do you recall calling Big Sky back a
11 couple days later to give a follow-up statement?

12 A. Yes. Did I? I don't recall that, no.

13 Q. Okay.

14 A. No, I called back later and asked if the
15 patient was okay.

16 Q. Okay.

17 A. Because it flipped me out. I thought
18 the guy was dead. I really did. Because they
19 choppered him off to Billings and a couple -- and I
20 didn't see anything in the newspaper. And so a
21 couple days later I called back and I said, "What
22 happened to that guy?"

23 (Whereupon, Deposition

24 Exhibit Number 67 was

25 marked for identification.)

TOM McMAKIN

1 BY MS. WALAS:

2 Q. Okay. I have what I've marked as
3 Exhibit 67. Do you recall who you spoke to when
4 you called back at Big Sky?

5 A. No.

6 Q. Okay. Do you recall if it was male or
7 female?

8 A. I don't recall.

9 Q. Okay. I'll go ahead and give you
10 Exhibit 67 and let you take a look at that and I'll
11 ask you some questions on that.

12 A. Yes.

13 Q. Now do you recall telling this person at
14 Big Sky that Mr. Meyer hits rocks after the cat
15 track?

16 A. Yes.

17 Q. Okay. So this is an accurate
18 representation of the statement that you made to
19 Big Sky?

20 A. Correct.

21 Q. Okay. Now these rocks or log or this
22 area where Mr. Meyer wrecked, was it marked in any
23 way?

24 A. So let's --

25 MR. McINTOSH: Objection, vague.

TOM McMAKIN

1 THE WITNESS: So let's be clear. So he's
2 coming down the ski slope, he hits the track, the
3 snow is rough. On the downside of that lip, my
4 recollection is there was exposed gravel on the
5 downside of the lip. He flipped and he landed on a
6 tree. So you're using -- you're saying where he
7 crashed. So there are two different elements of
8 the crash, where the crash was initiated and where
9 it ended.

10 MS. WALAS: Okay.

11 THE WITNESS: So there wasn't a log on the
12 road. But my recollection is that on this track,
13 on the downhill side there was a lip of icy
14 granular snow and then it was bare on the downhill
15 side there. There was gravel.

16 BY MS. WALAS:

17 Q. Okay. And in looking --

18 A. Early season conditions.

19 Q. And in looking at these pictures, can
20 you see the gravel that you're speaking of --

21 A. No.

22 Q. -- in either Exhibit 25 or 24 from
23 above?

24 A. No.

25 Q. Okay. And is the gravel that you're

TOM McMAKIN

1 talking about now, are those the rocks that you're
2 referring to in this statement?

3 A. Correct.

4 Q. Okay. And so at that gravel were there
5 any warning signs --

6 A. No.

7 Q. -- posted?

8 And were there any -- were there any
9 signs in the area at all identifying the cat track
10 or the road?

11 A. I don't recall. Lots of signs saying
12 early season conditions.

13 Q. Okay.

14 A. But I don't recall whether there was a
15 specific sign on the cat track. I just don't
16 recall anything. My recollection is that there
17 wasn't, but I don't recall.

18 Q. And do you recall if there was a
19 chairlift in the area?

20 A. So that's a good question. I don't -- I
21 don't ski this very much and so I don't -- I don't
22 have a good memory of that.

23 Q. Okay.

24 A. It seemed like there was a chairlift up
25 here to the right but that's the vaguest of

TOM McMAKIN

1 possible memories.

2 Q. Okay. So you're unclear if there was a
3 chairlift or not?

4 A. Yeah, I am unclear.

5 Q. And what do you consider early ski
6 conditions? You've been throwing that term around
7 and I just want to make sure that we're on the same
8 page when you're talking about early ski
9 conditions.

10 A. So patchy snow with obstacles. So thin
11 cover bleeding through to tree stumps and rocks
12 that you have to ski around or they'll trip you up.

13 Q. Okay. And you said something earlier in
14 your testimony that you -- you stopped on the cat
15 track or road. I know everybody that skis refers
16 to them as different things. So when I say cat
17 track and road I mean the same thing.

18 Now you had planned to stop there,
19 correct?

20 A. Yes.

21 Q. And with that knowledge, had you slowed
22 down prior to getting there?

23 A. Yeah.

24 Q. Okay. And when you normally ski, if
25 you're not going to stop -- be stopping to wait for

1 people on the cat track, do you just keep at your
2 speed and just keep going down?

3 MR. McINTOSH: Objection, vague.

4 THE WITNESS: I think sometimes, yes, and
5 sometimes, no. That's the fun of skiing, right?

6 MS. WALAS: Okay.

7 THE WITNESS: But I might have skied down and
8 just -- so you couldn't go straight on, right?
9 That's not an option. It was not -- that was not
10 open. But I could have -- and it's downhill so the
11 option is to take the cat track over left a little
12 left and then ski down over to this broader area.
13 And so I could imagine being by myself or with my
14 son and just skiing onto that cat track and sliding
15 parallel on the cat track and moving forward
16 because it's flat and you might want to keep your
17 speed going. But I can imagine stopping too and
18 it's in the moment.

19 BY MS. WALAS:

20 Q. Okay. And on December 11th you don't
21 know what Mr. Meyer's intentions were as he was
22 going down the hill?

23 A. No. No way I could know.

24 Q. And so when you testified that he was
25 getting ready to jump, that's just your guessing as

1 to what he was doing?

2 A. Yeah. It's just conjecture based on the
3 fact that it was -- he hadn't slowed down. He
4 wasn't turning. He was going straight down the
5 hill at a high rate of speed.

6 Q. Okay. And do you know Mr. Meyer's
7 skiing ability?

8 A. I have no idea.

9 Q. And --

10 A. He's a pretty good skier. I guess I do
11 know a little bit, right? I saw him for five
12 seconds ski down a difficult run at a high rate of
13 speed and he was -- he knows what he's doing. He's
14 got strong legs and he was hitting those moguls
15 hard.

16 Q. Now besides the call back and the ski
17 patroller that day at Big Sky, have you spoken to
18 anyone else from Big Sky?

19 A. Like I said, I had this recollection of
20 calling and asking if he was okay.

21 Q. The day of the wreck, did you talk to
22 any of the ski patrollers around?

23 A. So when they -- there were quite a
24 number of ski patrollers that came on the scene. I
25 might have said a few words like "Can I help?" I

TOM McMAKIN

1 think I took his skis. Like his skis had been
2 ejected and I was like, "Can I take them over to
3 the toboggan?" And they said that would be
4 helpful. I was trying to be helpful. And then
5 they asked me to -- so they put him in the toboggan
6 and took him over on this broad slope and went
7 down. And they asked me to ski behind them and
8 meet them at the ski patrol hut where I then made a
9 statement. So yes, I guess I do.

10 Q. And you said there were a lot of ski
11 patrollers around. Do you recall any of the ski
12 patrollers saying anything about the area that you
13 were standing in, like make any comments that just
14 stuck out in your mind?

15 A. No. They seemed very focused on the
16 quality of care. And there was clearly a senior
17 person, whether it was a doctor or, I don't know, a
18 senior medical person that -- my recollection is
19 that they felt lucky that that person was there and
20 available and on the scene and he seemed like he
21 was giving the orders. And they were just like
22 focused on getting this guy immobilized on the
23 toboggan down the hill as quickly as possible.

24 Q. And have you spoken to Big Sky's counsel
25 about this case?

TOM McMAKIN

1 A. Yes.

2 Q. Okay. How many times have you spoken
3 with him?

4 MR. MCINTOSH: Objection, relevance.

5 THE WITNESS: Less than seven and more than
6 two. I mean, so I think you spoke to me on the
7 phone, you had me do an affidavit, we -- the
8 plaintiff scheduled the deposition, the deposition
9 didn't happen, the deposition got rescheduled.
10 There was -- we've had some contact but really one
11 substantive time, is my recollection about what
12 happened.

13 MS. WALAS: Okay.

14 THE WITNESS: Yeah. The rest seemed like
15 scheduling and the kind of comedy of errors around
16 scheduling and representation.

17 BY MS. WALAS:

18 Q. Okay. And when you say "substantive"
19 conversation, is that in relation to the affidavit
20 you prepared?

21 A. Correct.

22 Q. And the facts that you put in that
23 affidavit, that was -- those were your facts,
24 correct?

25 A. Yes.

TOM McMAKIN

1 Q. Okay. And nothing that your discussions
2 with counsel that have -- have they influenced your
3 testimony?

4 A. No.

5 Q. Okay. And this is more of just a
6 practical question. We're videotaping your
7 deposition today I'm presuming because of the trial
8 will be in Great Falls. Would it be a hardship for
9 you to get to Great Falls in July to testify live?

10 A. Define hardship.

11 Q. That's up to the court to define
12 hardship, but.

13 A. I can get to Great Falls.

14 Q. You can?

15 A. It's not convenient --

16 Q. Okay.

17 A. -- right? It's a day of my life.

18 MS. WALAS: If we can go off the record real
19 quick, I might be all done.

20 VIDEO TECHNICIAN: We're now off the record.
21 The time is 2:10.

22 (Whereupon, a brief

23 recess was taken.)

24 VIDEO TECHNICIAN: We're back on the record.
25 The time is 2:10.

TOM McMAKIN

1 MS. WALAS: I don't have any further
2 questions at this time. Thank you.

3 THE WITNESS: Thank you.

4 RE-EXAMINATION

5 BY MR. McINTOSH:

6 Q. Mr. McMakin, just a few follow-up
7 questions.

8 First of all, you said you recalled on
9 December 11, 2015 when you skied in Big Sky, you
10 said you saw lots of signs that said early season
11 conditions. Do you remember saying that?

12 A. I do remember saying that, yes.

13 Q. Do you also recall seeing -- I'm going
14 to show you what's been previously marked as
15 Exhibit 19, and do you see the sign shown in
16 Exhibit 19?

17 A. I see the sign in this picture, yes.

18 Q. And can you read that that sign states
19 "Caution, Unmarked Hazards"?

20 A. Yes.

21 Q. And do you recall seeing signs that said
22 "Caution, Unmarked Hazards" on December 11, 2015?

23 A. I do, but I couldn't locate where this
24 sign is.

25 Q. You were asked by counsel a number of

TOM McMAKIN

1 questions about the rocks below the cat track, do
2 you recall those questions?

3 A. I do recall.

4 MR. McINTOSH: And we're on number 68; is
5 that correct?

6 MS. WALAS: Yes.

7 (Whereupon, Deposition

8 Exhibit Numbers 68 & 69

9 were marked for identification.)

10 BY MR. McINTOSH:

11 Q. Mr. McMakin, I'm going to hand you two
12 photographs that I've marked as Exhibits 68 and 69.
13 Please take a minute to review those.

14 A. (Witness complies.)

15 MS. WALAS: The one with the person is 68.

16 THE WITNESS: Okay.

17 BY MR. McINTOSH:

18 Q. And do you recognize what is shown in
19 Exhibits 68 and 69?

20 A. So I'm going to ask you some questions.
21 So this is the cat track; is that correct?

22 Q. Correct.

23 A. And is this -- this is not the cat
24 track, this is below it. The cat track is up here
25 where the packed snow is?

TOM McMAKIN

1 Q. And you're referring now to Exhibit 69?

2 A. Correct.

3 Q. Yes.

4 A. And you're looking over the edge of it,
5 yes. So what was your question?

6 Q. My question was, do you recognize what's
7 shown in Exhibits 68 and 69?

8 A. I have located them in my brain. These
9 were not -- so the left, 69, might have been my
10 perspective. But 68 was not my perspective. My
11 perspective was more of the person that's pictured
12 standing on the cat track.

13 Q. Okay. In picture 68?

14 A. Correct.

15 Q. Okay. So would you agree with me that
16 Exhibit 68 is a sideways view of the rocks below
17 the cat track?

18 A. Correct, looking uphill.

19 Q. And Exhibit 69 is a photograph looking
20 downhill at the rocks, correct?

21 A. Correct, sort of more eastward.

22 Q. And in both photographs 68 and 69 you
23 can clearly see the rocks, correct?

24 A. Correct.

25 Q. And are these -- the rocks shown in

TOM McMAKIN

1 Exhibits 68 and 69, are those the rocks that you
2 believe Mr. Meyer hit as you thought he was trying
3 to jump off the cat track?

4 A. Yes.

5 Q. And earlier you were asked a question
6 about what was going through Mr. Meyer's mind when
7 he came down and went by you. And, of course, you
8 don't know what was going through his mind, do you?

9 A. Right. No, I do not.

10 Q. But from what you observed, did it look
11 to you like he was trying to jump off the downhill
12 edge of the cat track?

13 A. Yes, that's what I said earlier. I
14 believe that he was going straight down the hill at
15 a high rate and he saw the cat track and he was
16 going to jump off that lip.

17 Q. Thank you, Mr. McMakin. That's all the
18 follow-up questions I have.

19 A. Okay.

20 MS. WALAS: I just have one, maybe two.

21 RE-EXAMINATION

22 BY MS. WALAS:

23 Q. You were asked about Exhibit 19 about
24 that sign?

25 A. Yes.

TOM McMAKIN

1 Q. Do you see that sign in any of the
2 pictures that you have been testifying about?

3 A. I do not.

4 Q. That's it. That's all I have. Thank
5 you.

6 A. Cool. Thank you both.

7 Q. Thank you.

8 A. Onward and upward.

9 VIDEO TECHNICIAN: This now ends the
10 deposition. The time is 2:15.

11
12 (Whereupon, the taking
13 of this videotaped deposition
14 was concluded at 2:15 p.m.)
15

16
17 SIGNATURE RESERVED
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TOM McMAKIN

DEPONENT'S CERTIFICATE

PAGE	LINE	CORRECTION
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I, TOM McMAKIN, the deponent in the foregoing deposition, DO HEREBY CERTIFY, that I have read the foregoing -40- pages of typewritten material and that the same is, with any corrections thereon made in ink on the correction sheet and signed by me, a full, true and correct transcript of my oral deposition given at the time and place hereinbefore mentioned.

DATED this _____ day of _____, 2020.

TOM McMAKIN

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TOM McMAKIN

C E R T I F I C A T E

STATE OF MONTANA)
) ss.
COUNTY OF GALLATIN)

I, Marla Jeske, Court Reporter - Notary
Public, CSR, in and for the County of Gallatin,
State of Montana, do hereby certify:

That the witness in the foregoing
deposition was by me first duly sworn to testify
the truth, the whole truth and nothing but the
truth in the foregoing cause; that the deposition
was then taken before me at the time and place
herein named; that the deposition was reported by
me in shorthand and later transcribed into
typewriting under my direction, and the foregoing
pages contain a true record of the testimony of the
witness, all done to the best of my skill and
ability.

IN WITNESS WHEREOF, I have hereunto set
my hand and affixed my notarial seal this ____ day
of _____, 2020.

Notary Public for the State of Montana
residing at: Bozeman
My commission expires: February 04, 2023

TOM McMAKIN

Page 40

DEPONENT'S CERTIFICATE

PAGE

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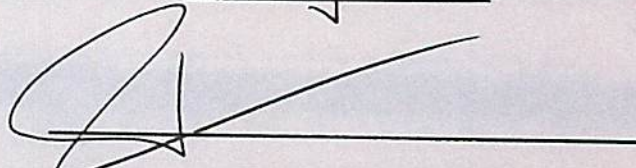
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I, TOM McMAKIN, the deponent in the foregoing deposition, DO HEREBY CERTIFY, that I have read the foregoing -40- pages of typewritten material and that the same is, with any corrections thereon made in ink on the correction sheet and signed by me, a full, true and correct transcript of my oral deposition given at the time and place hereinbefore mentioned.

DATED this 5th day of February, 2020.



TOM McMAKIN

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